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CASE NOTES

PATENTS—COMPUTER PROGRAMS—A PROCESS IN WHICH THE ONLY NOVEL FEATURE IS A MATHEMATICAL FORMULA IS NOT PATENTABLE SUBJECT MATTER DESPITE POST-SOLUTION APPLICATIONS—*Parker v. Flook*, 437 U.S. 584 (1978).

Dale R. Flook applied for a patent on a "Method For Updating Alarm Limits."¹ An "alarm limit" is a numerical value, which when reached, signals the presence of inefficient or dangerous chemical process operating conditions such as temperature, pressure, or flow rates. Alarm limits for particular processes normally remain fixed. However, during transient operating situations such as start-ups, alarm limits must be periodically updated to conform to changing operating capacities.

Flook sought to patent a method for updating alarm limits on process variables involved in the catalytic conversion of hydrocarbons. Such processes are common in the oil refining and petrochemical industries. The updating method consisted of three steps: an initial step measuring the present value of the process variable (for example, the temperature); an intermediate step using an algorithm to calculate an updated alarm value; and a final step adjusting the actual alarm limit to the updated value. The mathematical algorithm of the intermediate step of the method is a procedure for solving a given type of mathematical problem. It is this algorithm, used primarily for computerized calculations producing automatic adjustments in alarm systems, that distinguished Flook's method from conventional methods.²

The patent examiner rejected the application, finding that the subject matter claimed was not eligible for patent protection. The Board of Appeals of the Patent and Trademark Office sustained the rejection, reasoning that because mathematical formulae constituted the only difference between Flook's claims and the prior art in the public domain, a patent on his method would in practical effect be a patent on the cluster of mathematical formulae themselves. Such formulae are like laws of nature and are hence unpatentable subject matter.³ The

¹ 1979 by Gail-Deanna Salasny.

1. Serial No. 194,032, filed October 29, 1971.

2. *Id.* at 13.

3. The final portion of the U.S. DEP'T OF COMMERCE, PATENT & TRADEMARK OFF-

Court of Customs and Patent Appeals reversed,⁴ holding that since solving the algorithm was but an intermediate step in the entire procedure, and since Flook was claiming only the catalytic conversion applications of the algorithm, the invention was patentable subject matter under section 101 of the Patent Act.⁵

The Supreme Court granted certiorari and reversed in a six-three decision, holding that it was irrelevant that the algorithm was part of a process, or that the inventor was claiming only a limited use of the algorithm. The Court held that so long as the algorithm is the only new thing in the invention, there is no patentable subject matter. Laws of nature, including mathematical formulae, are considered to have always been known, to be part of the prior art, and to be in the public domain and available to all inventors. However, the Court refused to hold generally that computer programs are unpatentable, imploring Congress for a second time to decide the policy questions surrounding patent protection for computer software.⁶

Justice Stevens, writing for the Court, assumed that Flook's formula was novel and useful and that he discovered it. He also assumed that the formula was the only novel feature of the method since the Patent Office examiner's finding to

ICE, MANUAL OF PATENT EXAMINING PROCEDURE § 706.03(a) (3d ed., rev. 55, July, 1977) recites: "A scientific principle, divorced from any tangible structure, can be rejected as not within the statutory classes. *O'Reilly v. Morse*, 15 Howard 62." The beginning portion of that same section states: "Patents are not granted for all new and useful inventions and discoveries. The subject matter of the invention or discovery must come within the boundaries set forth by 35 U.S.C. 101. . . ." 35 U.S.C. § 101 (1970) provides: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor. . . ."

4. Application of Flook, 559 F.2d 21 (C.C.P.A. 1977). Appeal is authorized by 35 U.S.C. § 141 (1970).

5. The Patent Act of 1952, 35 U.S.C. § 101 (1970).

6. *Gottschalk v. Benson*, 409 U.S. 63, 73 (1972) ("[If] these programs are to be patentable . . . considered action by Congress is needed."). In *Gottschalk*, the first U.S. Supreme Court case in the area (*Flook* being the third), applicant claimed a method of programming a general-purpose digital computer to convert signals from binary-coded decimal form into pure binary form as a patentable process. It was held not to be a process within the meaning of 35 U.S.C. § 101, and thus not patentable subject matter.

Dann v. Johnston, 425 U.S. 219 (1976), was the second U.S. Supreme Court case in this area and involved a general purpose computer, programmed to provide bank customers with an individualized and categorized breakdown of their transactions: the invention being sold as a computer program and being claimed patentable as a machine within the meaning of 35 U.S.C. § 101. The Court held that it was unpatentable as being obvious to one skilled in the art (a 35 U.S.C. § 103 rejection) and did not reach the issue of general computer program patentability.

that effect went unchallenged by Flook. Justice Stevens stated: "The process itself, not merely the mathematical algorithm, must be new and useful. Indeed, the novelty of the mathematical algorithm is not a determining factor at all."⁷

*Mackay Radio & Telegraph Co. v. R.C.A.*⁸ and *Funk Brothers Seed Co. v. Kalo Inoculant Co.*⁹ were cited as pointing to the proper analysis for this case because the case turned on the proper construction of section 101 of the Patent Act, which describes the subject matter that is eligible for patent protection.¹⁰ Flook's process was unpatentable because once the algorithm was assumed to be within the prior art, the application considered as a whole contained no patentable invention.

The hopes that certain computer software would be patentable, raised when the lower court distinguished the *Flook* facts from *Application of Christensen*,¹¹ were dashed. In *Christensen*, although an algorithm as part of a method was held unpatentable, the holding was limited to processes where there was no post-solution application of the algorithm. The lower court also distinguished the *Flook* situation from *Gottschalk v. Benson*,¹² where a process for converting binary coded decimal numerals to pure binary numerals was held unpatentable. Unlike *Flook*, however, *Gottschalk* involved a patent that would have preempted the mathematical formula entirely; use of the algorithm in any manner would have constituted an infringement.

Until legislative action defines the policy concerning the nature of programs that may be appropriate for patent protection and the form and duration of such protection, the doctrine seems to be one of entrainment. At the present time, adding an algorithmic step to a process apparently will not destroy the patentability of that process, so long as the algorithmic step is surrounded by a process that, when examined alone, is protectable by a patent.

7. *Parker v. Flook*, 437 U.S. 584, 589 (1978).

8. *Mackay Radio & Telegraph Co. v. Radio Corporation of America*, 306 U.S. 86, 94 (1939): "While a scientific truth, or the mathematical expression of it, is not patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be."

9. *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948):
He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. If there is to be invention from such discovery, it must come from the application of the law of nature to a new and useful end.

10. The Patent Act of 1952, 35 U.S.C. § 101 (1970).

11. 478 F.2d 1392 (C.C.P.A. 1973).

12. 409 U.S. 63 (1972).

The Court's decision may have been influenced by the magnitude of the practical problems involved should computer software be deemed directly patentable. The Patent Office does not yet have a classification system or search files for computer software. Patent Office examiners are already straining under the volume of patent applications and the ever-increasing complexity of subject matter in many patent applications. Few examiners have software expertise, making staffing an additional strain. They would be unable to handle the thousands of additional applications. The wand has been passed to Congress, but Congress seems unwilling to act. Perhaps Congress has been swayed by the Patent Commissioner's argument that program patents would have a debilitating effect on the software industry. Alternately, Congress may feel that the copyright laws afford adequate and less expensive protection.

Gail-Deanna Salasny

CIVIL RIGHTS—PREVAILING DEFENDANT IN A TITLE VII CASE MAY BE AWARDED ATTORNEYS FEES UPON A FINDING THAT PLAINTIFF'S CLAIM WAS FRIVOLOUS, UNREASONABLE, OR GROUNDLESS—*Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978).

Rosa C. Helm, a black employee at Christiansburg Garment Co., Inc. (hereafter Christiansburg), who was laid off for a one-month period, filed a racial discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act (hereafter Act).¹ After two years of conciliation efforts with Christiansburg, the EEOC notified her that its attempts had been unsuccessful and advised her of her right to sue the company. Mrs. Helm, however, failed to pursue this remedy within the thirty-day statutory period.²

The Act was amended in 1972 to authorize the EEOC to bring suit in its own name on behalf of a victim of employment discrimination.³ The EEOC, concluding that the *Helm* case was pending before it when the amendment went into effect, brought suit on the charges in federal district court.⁴ The district court granted defendant Christiansburg's motion for a summary judgment, holding that the charge had not been pending on the effective date of the amendment, but rather that when Helm had been given her right-to-sue letter, the EEOC's authority over the case had terminated.⁵ Additionally, the district court found the EEOC's claim not "frivolous" because it was an issue of first impression and involved a reasonable, though erroneous, interpretation of the new amendment. The defendant's petition for an allowance of attorneys fees under section 706(k) of the Act was denied, and it appealed, contending that attorneys fees should be awarded to *all* defen-

" 1979 by Eileen Kato Player.

1. Title VII of the Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k), provides: "In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

2. *Id.* § 14, 42 U.S.C. § 2000e-5(e), requires that a charge must be brought "by or on behalf of the person aggrieved . . . within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law."

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at scattered sections of 5, 42 U.S.C.).

4. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 414 n.3 (1978).

5. *Id.* at 414.

dants who prevail in a Title VII action.⁶

The Supreme Court initially reviewed prior cases dealing with the award of attorneys fees in similar situations. Under the general "American rule," as set forth in *Alyeska Pipeline Co. v. Wilderness Society*,⁷ attorneys fees may not ordinarily be recovered by a prevailing party as part of its costs.⁸ However, limited exceptions to this rule have been developed. In *Newman v. Piggie Park Enterprises*,⁹ the Court, in interpreting a similar statute under Title II of the Civil Rights Act, authorized the award of attorneys fees to successful *plaintiffs* in a Title II action "unless special circumstances would render such a recovery unjust."¹⁰ The decision was based on the congressional intent to encourage individuals injured by racial discrimination to seek judicial relief.¹¹ In *Albermarle Paper Co. v. Moody*,¹² the *Newman* standard for the awarding of attorneys fees was applied to prevailing plaintiffs in a Title VII action.¹³ Again, the Court emphasized congressional objectives and strong public interest in encouraging eradication of discriminatory employment practice.¹⁴

In the present case, defendant Christiansburg contended that the standard enunciated in *Newman* for prevailing plaintiffs should also apply to prevailing defendants in a Title VII action.¹⁵ The EEOC argued, on the other hand, that a defendant should not be awarded attorneys fees unless it showed that the plaintiff's action was brought in bad faith. The Court rejected both arguments.¹⁶

With respect to defendant's contentions, the Court emphasized two strong policy considerations behind awarding attorneys fees to a prevailing plaintiff in a Title VII action that do not apply to the situation where a defendant prevails. First, the legislative history of section 706(k) indicates that the allow-

6. *Id.* at 413-14. See note 1 *supra*, for wording of § 706(k).

7. 421 U.S. 240 (1975).

8. *Id.* at 247.

9. 390 U.S. 400 (1968).

10. *Id.* at 402. Title II of the Civil Rights Act, § 204(b), 42 U.S.C. § 2000a-3(b) provides: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs, and the United States shall be liable for costs the same as a private person."

11. *Id.*

12. 422 U.S. 405 (1975).

13. *Id.* at 415.

14. *Id.*

15. 434 U.S. at 417-18.

16. *Id.* at 418.

ance for attorneys fees was included to make it easier for a plaintiff of limited means to bring a meritorious suit.¹⁷ Second, by awarding a successful plaintiff attorneys fees, it is the violator of federal law who pays the price.¹⁸

Turning to the EEOC's contention, the Court expressed doubt that Congress had enacted section 706(k) with the intent that attorneys fees be awarded to a prevailing defendant only upon a showing of plaintiff's bad faith.¹⁹ The Court felt it would not be fair to provide an incentive for plaintiffs to sue, and at the same time foreclose the possibility of the defendant recovering expenses for defending a groundless action unless (s)he could show bad faith. The Court referred to statements by several Senators in floor discussions of Title II that indicated their belief that awarding counsel fees to prevailing defendants would serve "to deter the bringing of lawsuits without foundation,"²⁰ "to discourage frivolous suits,"²¹ and "to diminish the likelihood of unjustified suits being brought."²²

The Court found that Congress had a dual intent in enacting section 706(k): 1) to encourage persons injured by employment discrimination to bring suit under Title VII, and 2) at the same time to provide defendants the opportunity to recover expenses resulting from "burdensome litigation having no legal or factual basis."²³

The Court adopted the standard first announced in *United States Steel Corporation v. United States*²⁴ to determine when attorneys fees should be allowed a prevailing Title VII defendant. The *U.S. Steel* court held that attorneys fees should be awarded to defendants "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."²⁵ In applying that standard to the facts of *Christiansburg Garment*, the Court found plaintiff's claim was not frivolous or without merit and, therefore, affirmed the district court's denial of fees.²⁶

17. *Id.* at 420.

18. *Id.* at 418.

19. No statutory provision would have been necessary, for under American common law, attorneys fees may be assessed against a party who has proceeded in bad faith. *Id.* at 419.

20. 110 CONG. REC. 13668 (1964) (remarks of Senator Lausche).

21. *Id.* at 14214 (remarks of Senator Pastore).

22. *Id.* at 6534 (remarks of Senator Humphrey).

23. 434 U.S. at 420. *See also* Grubbs v. Butz, 548 F.2d 973, 975 (D.C. Cir. 1976).

24. 519 F.2d 359 (3d Cir. 1975).

25. 434 U.S. at 421. A similar standard was announced in *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976).

26. 434 U.S. at 423-24.

This approach appears to strike a balance between two seemingly conflicting policies—encouraging Title VII suits and discouraging frivolous suits. Clearly both Congress and the Court are more concerned with eliminating employment discrimination, but the decision recognizes that fairness cuts both ways.

Eileen Kato Player

EVIDENCE—REMOTE SENSING OUTPUT OF FORWARD LOOKING INFRARED SCANNER (FLIR) IS INADMISSABLE FOR UNIQUE IDENTIFICATION OF OBJECTS—*United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978).

At about 1:45 a.m. on March 25, 1976, a customs patrol officer observed an unidentified blip on his screen at the radar control center in Phoenix, Arizona. The aircraft, in Mexican airspace and heading toward the United States border, did not emit the customary electronic identification signal. A customs plane was directed into the area. Using a forward looking infrared scanner (FLIR), a new system capable of detecting and tracking remote objects by sensing their infrared radiation,¹ the customs plane was able to observe and follow what appeared to be a DC-3 type aircraft. The plane was followed until it landed on a dry lake bed in San Bernardino County, California.

The customs plane continued its surveillance while circling at 5500 feet. The FLIR operator, Customs Officer James Gibbs, observed a peculiar pattern of "spots" around the elevator and left wingtip of the DC-3. Three trucks were observed approaching the aircraft and staying near it for nearly two hours. When the trucks departed, the customs plane followed them until they were intercepted by police who found 4700 pounds of marijuana in the trucks. By 4:30 a.m., when the customs plane returned to the lake bed, the DC-3 had departed. At about 6:00 a.m., a DC-3 piloted by Christopher Russel Kilgus landed at Las Vegas International Airport. At 8:00 a.m., the customs aircraft flew over the airport using the FLIR in an attempt to make a unique identification of the DC-3 observed on the dry lake bed.² Based on his observation of

¹ 1979 by Tom May.

1. FLIR is only one of a wide variety of remote sensing technologies. They have in common the collection of information about distant objects through the use of the electromagnetic spectrum. FLIR was originally developed for use aboard military combat aircraft to detect and track targets. FLIR operates by sensing nonvisible thermal infrared radiation emitted by the target object. The information received is electronically processed to enable display on a screen similar to a black-and-white TV. Although the range and resolution (sensitivity) of the FLIR remain military secrets, it is claimed to be capable of generic identification. That is, the image created might clearly be recognized as a DC-3 as opposed to other aircraft types. This seems consistent with its military objective.

For further information on infrared and other remote sensing technologies, see F. SABINS, JR., *REMOTE SENSING PRINCIPLES AND INTERPRETATION* (1978). See also Latin, Tannehill & White, *Remote Sensing Evidence and Environmental Law*, 64 CALIF. L. REV. 1300 (1976).

2. Unique identification refers to the ability to distinguish an individual object

"spots" around the elevator and wingtip of the DC-3 in Las Vegas, Officer Gibbs concluded that the Kilgus aircraft was the same DC-3 observed at the dry lake. Kilgus and his passengers were arrested and charged with illegal importation of marijuana and possession of marijuana with intent to distribute.³ A search of the Kilgus aircraft failed to recover any marijuana debris.

The case was heard in the United States District Court for the Central District of California. The defense moved to exclude the testimony of Officer Gibbs on the basis that FLIR had not gained acceptance within the relevant scientific community for the purpose of unique identification of objects and was therefore inadmissible as scientific evidence under the rationale of *Frye v. United States*.⁴ After a hearing, the court denied the motion. The case was submitted to the court on the hearing transcript, which included Officer Gibbs' testimony, and a joint stipulation of facts.⁵ Kilgus and his passengers were each found guilty and sentenced to three years in prison.⁶

On appeal to the Ninth Circuit Court of Appeals, the defendants renewed their arguments as to the admissibility of Officer Gibbs' testimony. The court of appeals reversed the convictions, concluding that Gibbs' testimony was both inadmissible and the only substantial evidence linking the defen-

among others of its type based on characteristics unique to that object. This would require greater sensitivity than a merely generic identification. In the present case, the Kilgus aircraft was only one of several DC-3's at the airport. This and additional facts presented in the text that do not appear in the reported decision can be found in, Opening Brief for Appellant at 24, 31, *United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978) (citing expert testimony and the joint stipulation of facts submitted to the trial court).

3. 21 U.S.C. §§ 841(a)(1), 952, 960, 963 (1976); 18 U.S.C. § 2 (1970). Appellants were also charged with, but not convicted of, conspiracy to commit these offenses.

4. 293 F. 1013 (D.C. Cir. 1923). *Frye* established, without citation to any authority, the rule that has become the touchstone for admissibility of scientific evidence. It states that the principle upon which scientific evidence is based "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Failure to clear this hurdle excludes the evidence from any consideration. While often criticized by commentators, it remains the rule in a great majority of jurisdictions. See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 203 (2d ed. 1972); J. RICHARDSON, *MODERN SCIENTIFIC EVIDENCE CIVIL AND CRIMINAL* §§ 6.3, 6.14-.16, 6.18 (2d ed. 1971); Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 10-15; Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313, 323-36 (1963). California adheres to the majority view. See *People v. Wochnick*, 98 Cal. App. 2d 124, 219 P.2d 70 (1950); *People v. Williams*, 164 Cal. App. 2d Supp. 858, 331 P.2d 251 (1958).

5. Opening Brief for Appellant at 1-2, *United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978).

6. *Id.* at 1.

dants to the crime.⁷

In resolving the admissibility question, the court noted four "serious problems" with Gibbs' testimony.⁸ First, Gibbs could not qualify as an expert on FLIR technology and had no training or experience in its use for unique identification. Second, uncontrolled environmental variables that influence FLIR performance had not been accounted for. The defense was able to show that temperature, humidity, barometric pressure, and wind conditions, all of which affect FLIR images, had been markedly different in Las Vegas at 8:00 a.m. than at the lake bed at 4:30 a.m. Third, the defense had been denied access, for reasons of military secrecy, to information necessary to evaluate FLIR capabilities and thus could not adequately impeach opposition testimony. Finally, citing *Frye*,⁹ the court observed that testimony of experts had established that "FLIR is *not* a generally accepted technique among the scientific community for the unique identification of remote objects."¹⁰

As a result, it seems clear that FLIR, at least at its present level of technology, will remain inadmissible for unique identification of objects. Even if qualified experts operated the equipment, environmental variables were accounted for, and technical information about the system were released, there would remain the lack of acceptance in the scientific community for unique identification. The court seems unwilling to allow the evidentiary use of FLIR to grow beyond its own design limits.

The court specifically held open the possibility that FLIR might be admitted for generic identification, "[a]ssuming a proper foundation as to reliability of generic identification and of the expertise of the operator" is established.¹¹ As an example, the court suggested that a continuous FLIR surveillance from an aerial intercept to a ground intercept might be used to establish the fact that a state or international border had been crossed.¹²

As a result of this dicta regarding the acceptable use of customs surveillance equipment, issues of FLIR admissibility

7. 571 F.2d at 509. Officer Gibbs was the only available witness as to the FLIR images because no permanent record was made of the electronic signals or the projected images. Opening Brief for Appellant at 14, *United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978).

8. 571 F.2d at 510.

9. *Id.*

10. *Id.* (emphasis in original).

11. *Id.* at 510 n.2.

12. *Id.*

in future cases will probably focus on its use for generic identification. While the "serious problems" in *Kilgus* will become the primary issues in such cases, they will, with one exception, be much easier to overcome where only generic identification is attempted. The lack of expertise could be overcome by training operators so they would qualify as expert witnesses, or by recording FLIR output to allow later analysis by established experts in the field. In addition, the level of expertise required to make generic identification may be less than that required for unique identification.

The second problem of uncontrolled environmental variables would seem irrelevant where surveillance is continuous, and only generic identification is attempted. This problem might also be resolved by later analysis and adjustment of recorded output. FLIR's acceptance in the scientific community for the purpose of generic identification has already been established and is assumed by the court in *Kilgus*.¹³ Expert testimony submitted at the hearing on the motion to exclude Gibbs' testimony confirmed that scientific acceptance of FLIR was limited to its use for generic identification.

The only remaining "problem" may be the continued unavailability to the defense of technical information as to FLIR capabilities due to military secrecy. Failure to overcome this last barrier may prevent use of FLIR for generic identification. It is not clear whether acceptance by the relevant scientific community combined with sufficient operator expertise and control of environmental variables will, without this last element, assure the court of FLIR's reliability even for generic identification purposes. While the letter of the *Frye* test may be satisfied in such a case, one of its intended purposes—to provide the defense an effective opportunity to rebut prosecution evidence¹⁴—would be frustrated by continued secrecy. For generic identification, the defense might want to know at what range FLIR becomes unreliable, what atmospheric conditions might interrupt an otherwise continuous image, or for that matter, what the military definition of "reliable" is. National security interests may prevent witness response to such questions.¹⁵ Such a situation may present a court with the problem

13. "There is no question that the FLIR can be used for generic identification of objects. . . ." *Id.* at 509 (emphasis in original).

14. *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977) (cited by the court in *Kilgus*), analyzes this and other policy factors supporting the *Frye* doctrine.

15. Expert witnesses in *Kilgus* declined to answer similar questions on this

of the admissibility of evidence based on scientifically accepted techniques where the basis of that acceptance is not open to judicial inquiry.

Tom May

ground. Opening Brief for Appellant at 23, *United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978).

EQUITABLE INDEMNITY—LIABILITY APPORTIONED BETWEEN A STRICTLY LIABLE DEFENDANT AND A NEGLIGENT DEFENDANT ON A COMPARATIVE FAULT BASIS—*Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

In January, 1978, plaintiff Rita Elliot was injured in a supermarket when the shopping cart she was using collapsed. Plaintiff brought suit against Safeway Stores and Nest-Kart, the manufacturer of the cart, arguing that the defendants were liable under theories of both negligence and strict liability. The defendants in turn raised a comparative negligence defense.

The trial court, following the suggestion of the California Supreme Court in *Li v. Yellow Cab*,¹ directed special interrogatories to the jury regarding under what theory, if any, each defendant was liable, and what proportion of the fault, if any, was attributable to each defendant. The jury found Safeway eighty percent at fault under both negligence and strict liability, and Nest-Kart twenty percent at fault under strict liability. The jury absolved the plaintiff of any comparative negligence. The court entered a total judgment of \$25,000 against the defendants. The judgment was paid by Safeway and Nest-Kart on the eighty percent/twenty percent basis.

Safeway moved for a judgment of contribution, requiring Nest-Kart to pay an additional thirty percent, to achieve an equal apportionment between the two tortfeasors. The trial court granted the motion, noting that although common sense suggested an eighty/twenty split, California's contribution statutes required an equal division of liability among joint tortfeasors.² The Court of Appeal for the Third District affirmed.³

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1. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975) (suggesting that such interrogatories would be invaluable in assuring proper jury consideration).

2. CAL. CIV. PROC. CODE § 875 (West Supp. 1978) provides in part:

(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.

(b) Such right of contribution shall be administered in accordance with the principles of equity.

(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. . . .

CAL. CIV. PROC. CODE § 876 (West Supp. 1978) provides in part: "(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them."

3. *Safeway Stores, Inc. v. Nest-Kart*, 134 Cal. Rptr. 150 (1977), *vacated*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

The California Supreme Court reversed, reapportioning the judgment on an eighty percent/twenty percent basis, using the doctrine of equitable indemnity it had recently developed in *American Motorcycle Association v. Superior Court*.⁴

In *American Motorcycle*, the California Supreme Court had examined the contribution statutes to determine if they needed to be followed slavishly when comparative fault had been established among multiple tortfeasors. While the common law indemnity doctrine required a more culpable tortfeasor, the California Legislature chose a contribution model under which the tortfeasors divided the liability equally. The development of jury interrogatories that more concisely determined the comparative fault of a plaintiff and various defendants suggested the application of a more equitable division of liability among defendants—a modified equitable indemnity doctrine.⁵ The *American Motorcycle* court concluded that the contribution statutes were not intended to bar the development of that doctrine and apportioned liability among multiple negligent defendants.

In *Safeway*, the supreme court expanded the equitable indemnity doctrine, using it to apportion liability between a negligent defendant and a strictly liable defendant. The court dismissed the argument that it is illogical to compare the relative fault of negligence with the relative “no fault” of strict liability, noting that “the suggested differences are more theoretical than practical,”⁶ and pointing out that California courts have extracted judgments from mixed groups of negligent and strictly liable defendants since *Greenman v. Yuba Power Co.*⁷ The court additionally observed that the jury below was able to find comparative fault between the defendants and to apportion the responsibility.

Public policy was an important basis of the court’s decision. It pointed out that “fairness and other tort policies, such as deterrence of dangerous conduct or encouragement of accident-reducing behavior, frequently called for apportionment of liability of joint tort-feasors.”⁸ An inconsistent judg-

4. *American Motorcycle Ass’n v. Superior Ct.*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

5. It should be noted that the indemnity doctrine only concerns itself with the liability of defendants to each other. The joint tortfeasors are still held jointly and severally liable for damages as against the plaintiff. See *id.*

6. 21 Cal. 3d at 331, 579 P.2d at 446, 146 Cal. Rptr. at 555.

7. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1973) (seminal case announcing California’s policy on strict liability).

8. 21 Cal. 3d at 330, 579 P.2d at 445, 146 Cal. Rptr. at 554.

ment would result where, as in this case, a negligent manufacturer could pay less than the less culpable but strictly liable manufacturer. The court concluded that "'common sense' and equitable considerations suggest that Safeway should bear a proportionately greater share of liability for the accident than Nest-Kart."⁹

Although the comparative indemnity question had been properly preserved at trial, the lower court's ruling occurred before *American Motorcycle*. The supreme court applied *American Motorcycle* retroactively, noting that the *Li* court, in adopting comparative negligence, had raised questions as to the future standing of the contribution statutes.¹⁰ The court concluded that, since the opinion in *Li* had advised trial courts to use broad discretion in making use of jury interrogatories in comparative negligence cases involving multiple defendants, these defendants had been on notice that apportionment of liability could be based on such interrogatories. Therefore, the court held that where interrogatories are used and the indemnity question preserved, the benefits of *American Motorcycle* will be available to *all* defendants diligently pursuing the issue.¹¹

Safeway is the latest in a series of cases determining the effect of the adoption of comparative negligence in *Li*. The decision in *Safeway* reaffirms the commitment in *American Motorcycle* to the doctrine of equitable indemnity. The equitable indemnity doctrine, not the contribution statutes, will be used when special jury verdicts establish comparative fault regardless of the tort theory used to establish liability. This decision encourages the use of interrogatories and suggests that a defendant may utilize them to apportion fault among all defendants—perhaps even when comparative negligence has not been raised as a defense. Defendants and trial courts are on notice to be resourceful in applying the doctrine of equitable indemnity.

L. Ronald Jorgensen

9. *Id.*

10. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

11. 21 Cal. 3d at 333-34, 579 P.2d at 447, 146 Cal. Rptr. at 556.

CRIMINAL LAW—CONFESSIONS MUST BE FOUND VOLUNTARY BEYOND A REASONABLE DOUBT—*People v. Jimenez*, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978).

On January 11, 1976, defendant Robert Jimenez and an accomplice entered El Norteno Bar in El Monte, California. In the process of committing armed robbery, defendant's companion shot and killed a customer attempting to exit through the back door.¹

Police obtained fingerprints of the defendants from a beer bottle at the scene of the crime. A waitress positively identified defendant from mug shots shown to her by police shortly after the robbery. Twelve days later, defendant and his companion were arrested at the latter's residence.²

Following his arrest, defendant was interrogated for several hours by two police officers. The officers allegedly frightened defendant with talk of the death penalty and speculated that things might go easier for him if he talked. Defendant then gave an oral confession in which he admitted participating in the robbery. He confessed to driving the getaway car and sharing in the stolen money, but stated that his codefendant had actually shot the customer. Several hours later, defendant tape-recorded a statement of essentially the same content.

During the trial, defendant moved to suppress these confessions on the ground that they were involuntary since they were induced by promises of leniency. The trial court, after a hearing on the motion, found the recorded statement voluntary but failed to declare what standard of proof it was applying. The recorded statement was played to the jury at defendant's trial, and he was convicted of first degree murder, armed robbery, and assault with a deadly weapon.³

The California Supreme Court reversed, voting six to one, holding that: 1) the prosecution must prove beyond a reasonable doubt that the confession was voluntarily obtained; and 2) defendant's confessions resulted from a promise of leniency and therefore were involuntary as a matter of law.⁴

Prior to *Jimenez*, California courts agreed that the burden of proof on the issue of voluntariness of confessions rested with

⁴⁹ 1979 by Michael K. Stevens.

1. *People v. Jimenez*, 21 Cal. 3d 595, 600, 580 P.2d 672, 674, 147 Cal. Rptr. 172, 174 (1978).

2. *Id.* at 601, 580 P.2d at 674, 147 Cal. Rptr. at 174.

3. *Id.* at 600, 580 P.2d at 674, 147 Cal. Rptr. at 174.

4. *Id.* at 609, 612-13, 580 P.2d at 679, 682-83, 147 Cal. Rptr. at 179, 182-83.

the prosecution. There was disagreement, however, as to whether the law required proof beyond a reasonable doubt or merely proof by a preponderance of the evidence.⁵ Those courts requiring proof beyond a reasonable doubt were interpreting the United States Supreme Court's requirement of "a fair and reliable determination of the issue of voluntariness"⁶ as a strict standard.

The United States Supreme Court confronted the issue directly in *Lego v. Twomey*,⁷ holding that the Constitution only requires proof by a preponderance of the evidence.⁸ The Court noted, however, that "the states are free, pursuant to their own law, to adopt a higher standard."⁹ Most California courts subsequently adopted the lower standard.¹⁰

In establishing the standard of proof beyond a reasonable doubt, the majority of the California Supreme Court in *Jimenez* first examined the consequences resulting from an erroneous admission of a confession. Stating that "the standard of proof may . . . vary, depending upon the gravity of the consequences that would result from an erroneous determination of the issue involved,"¹¹ the majority noted that a jury is not permitted to reconsider the issue once a trial judge admits a confession as voluntary. Appellate courts usually rubber stamp that determination unless it is entirely unworthy of belief. This being the case, the court stated that "the consequences resulting from an erroneous determination of the voluntariness issue are especially severe, because the trial court's decision is almost always determinative of this issue."¹²

The court noted several policy considerations that form the basis for the privilege against self-incrimination and justify requiring a strict standard of proof. According to the court, those policies are

5. Compare *People v. Jackson*, 19 Cal. App. 3d 95, 96 Cal. Rptr. 414 (1971) (proof beyond a reasonable doubt required); *People v. Daniels*, 1 Cal. App. 3d 367, 81 Cal. Rptr. 675 (1969) (proof beyond a reasonable doubt required); *People v. Stroud*, 273 Cal. App. 2d 670, 78 Cal. Rptr. 270 (1969) (proof beyond a reasonable doubt required) with *People v. Barrow*, 60 Cal. App. 3d 984, 131 Cal. Rptr. 913 (1976) (proof by preponderance of evidence required); *People v. Chen*, 37 Cal. App. 3d 1046, 112 Cal. Rptr. 894 (1974) (proof by preponderance of evidence required).

6. *Jackson v. Denno*, 378 U.S. 368, 377 (1964).

7. 404 U.S. 477 (1972).

8. *Id.* at 486-88.

9. *Id.* at 489.

10. See, e.g., *People v. Barron*, 60 Cal. App. 3d 984, 131 Cal. Rptr. 913 (1974); *People v. Chen*, 37 Cal. App. 3d 1046, 112 Cal. Rptr. 894 (1974); *People v. Moreno*, 61 Cal. App. 3d 688, 132 Cal. Rptr. 569 (1976).

11. 21 Cal. 3d at 604, 580 P.2d at 677, 147 Cal. Rptr. at 177.

12. *Id.* at 607, 580 P.2d at 678, 147 Cal. Rptr. at 178.

"... unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . fear that self-incriminatory statements will be elicited by inhuman treatment and abuses . . . respect for the inviolability of the human personality . . . and . . . realization that the privilege, while sometimes 'a shelter to the guilty' is often a 'protection of the innocent.'"¹³

Additionally, the majority found that the application of this stricter standard would possibly have a positive effect on the fact-finding process in that the higher standard would reduce the number of coerced confessions in general, thereby reducing the number of coerced *false* confessions.¹⁴ Finally, the court noted that by its establishment of the appropriate standard of proof in California for determining the voluntariness of a confession: "Any uncertainty that may have existed in the years after *Lego* . . . will now be eliminated and continuity will be restored to the law on this issue."¹⁵

The majority stated that the result was required as "a judicially declared rule of criminal procedure,"¹⁶ and declined to decide the question on the basis of the California Constitution. Therefore, the path remains open for the state legislature to reinstate the lower standard of proof.

Justice Clark argued in dissent that since the majority found the confessions involuntary as a matter of law, their "judicially declared rule of criminal procedure" is mere dicta.¹⁷ Relying on *Lego*, Clark concluded that proof by a preponderance of the evidence is all that is necessary since it is very doubtful that the reasonable doubt standard will prevent enough lawless police conduct to outweigh the public interest in arriving at the truth.¹⁸

People v. Jimenez emphatically established the standard for determining the issue of voluntariness of a confession in California. It also focused on the high value courts place on constitutional rights and their protection. Certainly, it has increased the burden of proof of the voluntariness issue, but the increase is justified considering the serious nature of confessions and the manner in which they may sometimes be ob-

13. *Id.* at 605, 580 P.2d at 677, 147 Cal. Rptr. at 177 (quoting *Quinn v. United States*, 349 U.S. 155, 162 (1954)).

14. *Id.* at 607, 580 P.2d at 678, 147 Cal. Rptr. at 178.

15. *Id.* at 608, 580 P.2d at 679, 147 Cal. Rptr. at 179.

16. *Id.* at 605, 580 P.2d at 677, 147 Cal. Rptr. at 177.

17. *Id.* at 614, 580 P.2d at 683, 147 Cal. Rptr. at 183.

18. *Id.* at 614-15, 580 P.2d at 683-84, 147 Cal. Rptr. at 183-84.

tained. Whether this new standard will inhibit the ultimate goal of arriving at the truth is a difficult question. A higher standard may result in a "more accurate truth" even though it makes that truth more difficult to prove.

Michael K. Stevens

FAMILY LAW: ADOPTION—PRESUMED FATHER: MINIMUM CONTACT WITH CHILD REQUIRED TO SUPPORT PRESUMPTION UNDER CALIFORNIA CIVIL CODE SECTION 7004(a)(4)—*Adoption of Marie R.*, 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978).

Two men, Scott R. and Charles K., claimed to be the father of infant Marie R. Less than a month before Marie's birth, Charles filed a complaint to establish paternity. Sheila R., Marie's mother, had been engaged to Charles, but decided to marry Scott three days before Marie's birth. The birth certificate named Scott as the father. Blood tests performed to determine paternity were inconclusive. Charles had offered to contribute to prenatal, birth, and after-birth expenses. Sheila had refused to accept any support from Charles. She also prevented him from ever actually seeing the baby.

Immediately after Marie's birth, Sheila and Scott placed the baby with petitioners Jill and Ronald K. for adoption. Petitioners began adoption proceedings in the Superior Court of Los Angeles County. Since Charles' paternity action was still pending, they provided him with notice of the proceedings pursuant to California Civil Code section 7017.¹

Charles contended that he became a "presumed" father under California Civil Code section 7004(a)(4), which provides, in part, that a man is presumed to be the natural father of a child if he "receives the child into his home and openly holds out the child as his own natural child."² The trial court held that although the mother prevented actual receipt of the baby by Charles, his active attempt to have the child with him constituted constructive reception.³ He was, therefore, the presumed father of Marie, and his consent was required⁴ before the adoption could proceed.⁵ Petitioners Scott and Sheila appealed this order.

The issue before the court on appeal was whether Charles

¹ 1979 by Merrill L. Zebe.

1. CAL. CIV. CODE § 7017(a)(1) (West Supp. 1978) provides in relevant part: "If a mother relinquishes or consents to or proposes to relinquish for adoption a child who has (1) a presumed father under subdivision (a) of Section 7004 . . . , the father shall be given notice of the adoption proceeding. . . ."

3. *Matter of Adoption of Marie R.*, 79 Cal. App. 3d 624, 626, 145 Cal. Rptr. 122, 124 (1978).

4. CAL. CIV. CODE § 224 (West Supp. 1978) provides in part: "A child having a presumed father under subdivision (a) of section 7004 cannot be adopted without the consent of its parents if living. . . ."

5. 79 Cal. App. 3d at 627, 145 Cal. Rptr. at 124.

had qualified as a "presumed" father under Civil Code section 7004(a)(4).⁶ The appellate court concluded that, absent a showing of minimal contact with the child, there could be no receipt, constructive or otherwise, by a purported father to raise the presumption.⁷

In support of his claim to being a presumed father, Charles relied upon a series of cases decided under former Civil Code section 230, which provided that if the father of an illegitimate child publicly acknowledged it as his own, received it into his family, and otherwise treated it as if it were a legitimate child, he thereby adopted it as such.⁸ The court found that the cases decided under former section 230 had some value in interpreting section 7004(a)(4) of the Uniform Parentage Act, as adopted in California, due to the similarity in language between the two sections.⁹ The court concluded, however, that those cases were not controlling in the case at bench since section 230, by its terms, presupposed the fact of paternity and dealt with the concept of legitimacy, whereas the thrust of the new legislation was to promote the establishment of a parent-child relationship.¹⁰

In addressing Charles' main argument that he had openly recognized Marie as his own and had thereby constructively received her into his home, the court found that even in those cases decided under former section 230, where the courts were straining to find legitimation, there was some actual contact between the natural father and child.¹¹ The court thus held that there must be minimal contact for there to be receipt to establish the presumption under section 7004(a)(4).¹²

The court's holding narrows the interpretation of "receipt" by requiring that a purported father show some minimal contact with the child before a presumption of paternity can be drawn in accordance with Civil Code section 7004(a)(4). It

6. *Id.* at 628, 145 Cal. Rptr. at 125.

7. *Id.* at 630, 145 Cal. Rptr. at 126.

8. CAL. CIV. CODE § 230 (West 1954) (repealed by 1975 Cal. Stats. ch. 1244, § 8).

9. 79 Cal. App. 3d at 629, 145 Cal. Rptr. at 125.

10. *Id.*

11. See *Lavell v. Adoption Inst.*, 185 Cal. App. 2d 577, 8 Cal. Rptr. 367 (1960) (an admitted natural father had lived with the mother at conception and had openly acknowledged that the expected child was his); *Hurst v. Hurst*, 277 Cal. App. 2d 859, 39 Cal. Rptr. 162 (1964) (an admitted natural father rented an apartment in his name for the mother and child and paid the expenses of the household); *In re Richard M.*, 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975) (the natural father and mother had lived together for two weeks after the birth of the child, and thereafter, the child, with the consent of the mother, visited the father).

12. 79 Cal. 3d at 630, 145 Cal. Rptr. at 126.

clearly establishes that reasonable efforts to receive the child are not sufficient to support the presumption. It leaves unanswered the question whether actual physical reception into the purported father's home is required. The decision, therefore, does not exclude the possibility of other courts finding contact sufficient to constitute constructive reception. Since this court did not define the degree of minimal contact necessary to establish paternity rights, such interpretative problems will persist under the Uniform Parentage Act until there are more specific guidelines established.

The *Marie* decision reflects the present policy of the Uniform Parentage Act to promote the establishment of a parent-child relationship rather than technical legitimation. The decision is favorable to the adoptive parents and their already established relationship with the child. The court properly focuses on who should care for the child rather than struggle with a tenuous claim to paternity.

Merril L. Zebe

